Supreme Court, U.S.
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No. 96-1967

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AROMA MANUFACTURING, INC.,
Petitioner,

vs.

ALTERNATIVE PIONEERING SYSTEMS, INC.
d/b/a AMERICAN HARVEST,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTION PRESENTED

Whether the Court of Appeals for the Federal Circuit has so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by the district court, as to call for exercise of this Court's power of supervision, where:

- The court of appeals affirmed the district court's judgment pursuant to its established rules of procedure, after the parties fully briefed the issues on appeal and presented oral argument;

- The district court entered judgment based upon written factual findings and established principles of law, after two years of litigation involving numerous hearings, extensive briefing and submission of evidence by the parties;

- The district court found that the complaint gave sufficient notice to include the products for which damages were awarded, where respondent Alternative Pioneering Systems, Inc. ("Alternative Pioneering") gave prior written notice of patent infringement to petitioner Aroma Manufacturing, Inc. ("Aroma") with respect to the type of products at issue, where Aroma engaged patent counsel to defend it against anticipated litigation by Alternative Pioneering and where the complaint contained notice pleading allegations of patent infringement;

- The district court found that Alternative Pioneering's own products were not covered by the patent at issue, and thus not required to be marked with that patent number; and

- The district court awarded Alternative Pioneering its reasonable attorney's fees, after finding by clear and convincing evidence that this case is exceptional under 35 U.S.C. § 285, based upon findings that Aroma willfully infringed Alternative Pioneering's patents and engaged in misconduct during litigation.

LIST OF PARTIES

In addition to the parties listed by petitioner, respondent lists Nesco/American Harvest Corp., a wholly owned subsidiary of The Metal Ware Corporation, which has acquired the assets of Alternative Pioneering Systems, Inc. d/b/a American Harvest.

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STATUTES AND RULES

In addition to the statutes and rules cited by Aroma, Alternative Pioneering cites the following:

35 U.S.C. § 285

The court in exceptional cases may award reasonable attorney fees to the prevailing party.

(July 19, 1952, ch. 950, § 1, 66 Stat. 813.)

Rule 12(a)(1), Federal Rules of Civil Procedure

Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on Pleadings

(a) When Presented.

(1) Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer

(A) within 20 days after being served with the summons and complaint, or

(B) if service of the summons has been timely waived on request under Rule 4(d), within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States.

Rule 36, Rules of Practice before the United States Court of Appeals for the Federal Circuit

Judgment of affirmance without opinion. -- The court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following circumstances exist:

(a) the judgment, decision or order of the trial court appealed from is based on findings that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(d) the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or

(e) a judgment or decision has been entered without an error of law;

and an opinion would have no precedential value.

STATEMENT OF THE CASE

Far from being a compelling case requiring exercise of this Court's power of supervision, this case involves a frivolous attempt by Aroma to escape liability for infringement of Alternative Pioneering's U.S. Patent No. 5,165,328 (the " '328 patent"). By selling over 30,000 infringing products (A. 20a), Aroma caused over $1.3 million in actual damages to Alternative Pioneering (A. 33a), and, through bad faith litigation tactics, caused Alternative Pioneering to incur over $170,000 in attorney's fees, as well as another $170,000 in lost use of revenue, measured as prejudgment interest. (A. 10a).

The district court found Aroma's infringement to be willful by clear and convincing evidence, and also found Aroma to have engaged in misconduct during litigation. (A. 31a - 32a). Accordingly, the district court found this case to be exceptional under 35 U.S.C. § 285, and awarded Alternative Pioneering its reasonable attorney's fees (A. 33a) in addition to its actual damages. *Id.*

Aroma then filed two appeals, one from the judgment awarding actual damages (Appeal No. 96-1417),[1] and the other from the order determining the amount of attorney's fees (Appeal No. 96-1500).[2] Both Aroma and Alternative Pioneering filed briefs and presented oral argument in accordance with the court of appeals' established rules of procedure, and the court of appeals affirmed the district

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[1] Co-defendant Imex Corporation ("Imex") also filed an appeal (Appeal No. 96-1418), which was dismissed for failure to tile an appellant's brief.

[2] Aroma appealed that order even though it did not challenge the amount of attorney's fees requested by Alternative Pioneering in the district court. (A. 7a).

court's judgment and order without opinion (A. 5a - 6a), pursuant to Rule 36 of the court of appeals' Rules of Practice:

> Rule 36. Entry of judgment
>
> *Judgment of affirmance without opinion* -- The court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following circumstances exist:
>
> (a) the judgment, decision or order of the trial court appealed from is based on findings that are not clearly erroneous;
>
> (b) the evidence in support of a jury verdict is sufficent;
>
> (c) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
>
> (d) the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or
>
> (e) a judgment or decision has been entered without an error of law;
>
> and an opinion would have no precedential value.

In this case, judgment was not entered on a jury verdict or upon summary judgment, and there was no administrative agency decision. Accordingly, the court of appeals

necessarily determined that an opinion would have no precedential value and that the district court's judgment was based on findings that were not clearly erroneous, or had been entered without error of law.

Notwithstanding, Aroma filed a petition for rehearing, with a suggestion for rehearing *en banc*. Both were denied by the court of appeals. (A. 1a - 2a).

Having had the full benefit of all procedural safeguards afforded by due process, and lost on the merits at every turn, Aroma now seeks to further prolong this litigation, and evade responsibility for its willful infringement, by misstating the record and portraying itself as an innocent victim of a legal system gone awry.

Like a wolf in sheep's clothing, Aroma wears its feigned innocence as a disguise for its willful and blatant disregard of Alternative Pioneering's property rights, as well as the judicial process. As discussed in detail below, Aroma willfully infringed Alternative Pioneering's '328 patent, and then purposely embarked upon a strategy of deception and delay in this litigation, in a misguided attempt to continue its willful infringement for as long as possible. The district court and the court of appeals did not allow Aroma to succeed with its misbegotten strategy. Nor should this Court. Aroma's petition should be denied.

A. Factual Background

The underlying action is a patent infringement action filed by Alternative Pioneering against Aroma and Imex[3]

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[3] Imex' appeal was dismissed and it is not appearing before this Court.

for willful infringement of three patents owned by Alternative Pioneering: United States Patent Nos. 4,817,509 (the " '509 patent"); 5,165,328 (the " '328 patent"); and Des. 328,687 (the " '687 patent"). All three patents relate to countertop ovens generally used as household appliances.

1. Aroma Was Notified Of Its Infringement Before The Complaint Was Filed

On January 17, 1994, Alternative Pioneering hand delivered a letter to Aroma at a trade show in Chicago, Illinois, giving notice of infringement of the '328 patent (R. 795-96).[4] Aroma did not respond to Alternative Pioneering, but instead engaged a Chicago law firm, Azulay and Azulay ("Azulay"), to defend it jointly with co-defendant Imex. As Azulay stated in a letter to Imex, dated April 19, 1994:

> As I have advised you in my last communication, a letter will be prepared for **Aroma** Manufacturing Company in regards to any patent infringement against Alternative Pioneering. Mr. Chang has also expressed that we include in our letter that our firm will represent and defend them and their customers should there be a case against them in this matter. Should this

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[4] All references to the record herein (R. __) are made to the appendix filed in the court of appeals. Because that appendix ustilizes the format (A. __) to designate its contents, the letter "R." herein substitutes the letter "A." in the appendix below.

> happen, we will have to bill you for services done at our normal hourly rate.

(R. 1101, bold emphasis added).

Then, on May 1, 1994, Alternative Pioneering hand delivered another letter to Aroma giving further notice of infringement of the '328 patent, and the '509 patent as well (R. 793-94). When Aroma failed to provide a prompt response, Alternative Pioneering filed its complaint, on May 2, 1994, and personally served Aroma's president, Peter Chang, the next day (R. 96). Alternative Pioneering then served co-defendant Imex by certified mail on May 10, 1994 (R. 107) and by personal service at Imex' location in South Korea on June 29, 1994 (R. 158).

2. Aroma Employed A Strategy Of Deception And Delay

On May 24, 1994, Aroma filed a motion for a 15 day extension of time to answer the complaint, on the false ground that it was not represented by counsel and that its president, Peter Chang, who had been personally served with the complaint, was out of the country (R. 97-98). As mentioned above, Aroma had previously engaged the Azulay firm in Chicago to defend it (R. 1100-02) after Alternative Pioneering hand delivered a notice of infringement to Aroma in Chicago four months earlier, on January 17, 1994 (A 795-96). Azulay drafted the motion and instructed Aroma to file it in pro per[5] (R. 228-29), in

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[5] Although Aroma is a corporation and not an individual doing business under a fictitious name, Aroma was allowed by the district court to file its initial motions for extension of time in pro per.

order to create the deception that Aroma was not represented by counsel. The transparent motive, of course, was to manipulate the judicial process for as long as possible in order to continue willfully infringing activity for as long as possible. As Aroma later admitted in an affidavit of its sales manager, Abdullah Mamao, dated April 5, 1995:

> The law firm of Azulay and Azulay specifically Stephen Berman in Chicago represented Aroma Manufacturing and Imex Corporation in this matter. As soon as Aroma was served with the complaint we forwarded it to Azulay and Azulay and from that moment forward they rendered legal advice and opinions on how to proceed on the defense of this case.
>
> Attached as Exhibit "A" is a faxed letter from attorney Steve Berman of Azulay and Azulay dated May 20, 1994 in which he advised Aroma Manufacturing to file an extension to answer. He prepared the motion for us and gave us instructions.
>
> Attached as Exhibit "B" is a faxed letter from Steve Berman dated June 7, 1994 in which he advised Aroma Manufacturing to file a second motion for extension to answer. He prepared the motion and gave us instructions.
>
> Attached as Exhibit "C" is a letter dated June 14, 1994 and enclosed was the third motion for extension of time to answer.

> Attached as Exhibit "D" is a letter dated June 14, 1994 where Steve Berman is enclosing Aroma Manufacturing's response to Plaintiff's motion to vacate 30 day extension of time. Mr. Berman also prepared the response to the motion.
>
> Attached as Exhibit "E" is a pleading which is entitled in the caption "Complaint For Patent Infringement" but is also entitled "Motion to Set Aside Clerk's Entry of Default" which was prepared by Attorney Steve Berman and filed on behalf of Aroma to correct entry of default. In that pleading on page 2 paragraph 5, Mr. Berman incorrectly states that "Defendant Aroma Manufacturing has not until this time been represented by counsel." All pleadings that Aroma filed with the Court were at the specific instruction of and prepared by the law firm of Azulay and Azulay, as the above mentioned exhibits indicate.

(R. 228-29).

a. Aroma Was Granted Two Extensions Of Time To Answer The Complaint

In reliance on Aroma's false representations, the district court exercised its discretion favorably to Aroma and extended Aroma's time to file its answer to June 7, 1994.

However, on the last day of its extended time to answer the complaint, Aroma filed yet another motion for extension of time to answer the complaint (R.100-01), which was again drafted by Aroma's counsel at the Azulay firm in Chicago (R. 229; R. 232). Again, the motion was filed in pro per. This time, however, the motion was signed by Aroma's president, Peter Chang (A 101), whose purported absence from the country was previously stated as a ground for the first extension of time.

In its second motion, Aroma requested an additional thirty days to answer the complaint and continued its deception that it was still not represented by counsel, but would probably engage common counsel with Imex. In fact, Aroma and Imex had been jointly represented by Azulay for months, in anticipation of this action (R. 1100-02.

Again, the district court exercised its discretion in favor of Aroma and extended Aroma's time to answer the complaint by thirty days, until July 11, 1994. With that extension, Aroma was granted 65 days to answer the complaint, or 325% of the time ordinarily provided by Rule 12(a), F.R.Civ.P.

b. Aroma Abused The Extended Time And Sought Additional Delay

Instead of utilizing the extended time in good faith to prepare an answer, Aroma's counsel drafted yet a third motion seeking an indefinite extension of time (R. 115-17) and sent it to Aroma on June 14, 1994, just 4 days after the district court granted Aroma's second request for extension

of time. Azulay instructed Aroma to file the motion by July 7, 1994, more than three weeks later:

> Enclosed please find Defendant's Third Motion for Extension of Time to Answer. Sign the motion and certificate of service and have it notarized. Please make at least 5 copies of said Motion and file it with the court. Be advised that this must be filed by July 7, 1994. If you have any questions, please contact my offices.

(R. 233; 229)

Aroma not only waited until July 7 to file its third motion, but waited yet another day, until July 8, 1994, just three days before its time to answer would expire.

Thus, Aroma had no intention of answering the complaint and, *for twenty three days of the thirty day extension granted by the district court, Aroma simply sat upon a prepared motion for yet another extension of time, the latest motion seeking not 15 days, nor 30 days, but an indefinite extension of time.* Aroma's ever-increasing requests for extensions of time reveal not only its lack of intention to ever answer the complaint, but its increasing boldness in manipulating the process of the district court as well.

Aroma's boldness led to miscalculation, however, because the district court, having twice granted Aroma extensions of time to answer the complaint, denied Aroma's third motion for an indefinite extension of time (R. 118).

c. Aroma Intentionally And Culpably Did Not Answer The Complaint, Its Default Was Entered, And It Unsuccessfully Sought Relief From Its Culpable Default

Because Aroma filed its motion just three days before its time to answer would expire, the district court acted promptly in ruling on Aroma's motion. The district court signed its ruling on July 11, 1994 and mailed copies of its ruling to all parties (R. 118). Aroma's counsel admitted that Aroma received a copy of the court's ruling "before" July 26, 1994 (R. 127).

After Alternative Pioneering received the court's ruling in the mail, it waited for Aroma's answer, until two weeks past Aroma's extended time to answer had expired. However, by July 25, 1994, Aroma failed to file or serve an answer or other responsive pleading, so Alternative Pioneering requested entry of default (R. 119-20). Default was then entered against Aroma on July 27, 1994 (R. 124), and Alternative Pioneering received a copy of Aroma's default by mail. Alternative Pioneering in turn mailed a copy of the entry of default to Aroma on August 2, 1994 (R. 125).

Although the district court had previously mailed to Aroma a copy of its ruling denying Aroma's third motion for an indefinite extension of time, which Aroma admittedly received before July 26, 1994 (R. 127), Aroma took no action for at least four weeks, until August 23, 1994. On that date, Aroma filed a motion to set aside its default, pursuant to Rule 55(c), F.R.Civ.P. (R. 126).

Aroma's motion to set aside the default was signed by Aroma's counsel, Stephen Berman of the Azulay firm, who finally surfaced after his strategy of deception and delay

had gone awry. Aroma's motion utterly failed to establish good cause for setting aside the default. Instead, Aroma asserted that its counsel had not learned that Aroma's third motion for extension of time had been denied until July 26, 1994 (one day before the default was entered) and that Aroma itself did not learn of the denial until "shortly before that date" (R.127) Incredibly, but consistent with its pattern of deception, Aroma also stated in its motion, filed on August 23, 1994, that it "has not until this time been represented by counsel." Id.

Even more remarkably, Aroma misrepresented in its supporting memorandum that, "By the time AROMA received a denial of its request for an extension of time to Answer, the clerk has already made an automatic entry of default." (R. 139). That representation is completely undermined by Aroma's assertion that its counsel learned of the denial one day before the default was entered, and that Aroma itself knew of the denial "shortly before that date." (R. 127).

The district court heard Aroma's motion on November 7, 1994 and issued a detailed, seven-page memorandum decision and order denying Aroma's motion on November 16, 1994 (Appendix L; R. 168-74). In its decision, the district court analyzed the facts and authorities applicable to Aroma's default, and gave a well-reasoned, firmly supported opinion denying Aroma's motion.

Notwithstanding, Aroma filed a motion for reconsideration of the decision denying its motion to set aside its default. Aroma's motion was unsupported by any factual or legal grounds, and was untimely filed; the district court denied Aroma's motion for reconsideration as untimely.

3. A Partial Default Judgment Was Entered, Permanently Enjoining Aroma From Infringing Alternative Pioneering's Patents

On December 19, 1994 Alternative Pioneering filed a motion for entry of partial default judgment, which the district court granted on January 24, 1995 (Appendix K; R. 215-22). Among other relief, the partial default judgment permanently enjoined Aroma from infringing Alternative Pioneering's patents and reserved the issues of damages, costs, attorney's fees and prejudgment interest until after completion of discovery or such other time as the district court may set. (Appendix J).

Notwithstanding the denial of its August 23, 1994 motion to set aside its default, and the denial of its motion for reconsideration of that denial as untimely, Aroma filed another motion to set aside the default on May 26, 1995, under Rule 55(c), F.R.Civ.P. (R.511). The district court treated that motion as a motion for relief from judgment under Rule 60(b), F.R.Civ.P., and considered the merits of Aroma's motion. (A 608).

Again, Aroma failed to establish good cause for setting aside the default, or any ground for relief from the default judgment, and its motion was denied on July 5, 1995. (Appendix G; R. 605-14).

4. Aroma Violated The Injunction By Selling Its Aeromatic Ovens With Expansion Rings

Notwithstanding the permanent injunction against infringement of Alternative Pioneering's patents, Aroma continued to infringe. In early May, 1995, Alternative Pioneering learned that Aroma was displaying and selling infringing products at a trade show. It then filed an expedited motion to enforce the permanent injunction (R. 235), which was granted on May 3, 1995 after a hearing (R. 272-73). The enforcement order specifically enjoined Aroma from making, using or selling its "AeroMatic Oven" products with "expansion rings," which infringe the '328 patent.

During the hearing, Aroma's counsel argued that the AeroMatic Oven products of Aroma were outside the scope of the complaint and the partial default judgment (R.279). The district court rejected that argument, but continued the hearing for two weeks, until May 15, 1995, to allow Aroma additional time to present its argument, and to hear Alternative Pioneering's motion for contempt resulting from Aroma's violation of the injunction (R. 287). Aroma reasserted its arguments during the May 15 hearing, and the district court issued its written ruling on May 22, 1995 reaffirming its previous ruling that the AeroMatic Oven products of Aroma infringe the '328 patent and are within the scope of the complaint and the injunction (Appendix I; R. 494-500).

5. Discovery, Extensive Briefing And Oral Argument Were Allowed Regarding Damages

Thereafter, the parties continued discovery with respect to the damages and other reserved issues, fully understanding that Aroma's AeroMatic Oven products were within the scope of the complaint and the damages to be awarded to Alternative Pioneering.

After the discovery period ended, Alternative Pioneering filed a motion for determination of damages, together with a motion for findings of exceptional case and willful infringement. (R. 627; 712)

That same day, January 12, 1996, Aroma filed yet another, thinly disguised, motion to set aside the default, which it dubbed a "motion for clarification." (R. 732). Aroma sought by that motion to raise infringement and validity defenses which had been foreclosed by its default and the partial default judgment. Aroma also sought by that motion to obtain a "full Court trial" which it gave up when its default and the default judgment were entered.

The district court held a hearing on those motions on February 12, 1996, and decided that the issues could be decided on the written record, without the necessity of a trial. The district court then allowed Aroma to file a declaration from its accounting expert witness in order to address evidence presented by Alternative Pioneering as to damages. The district court also requested supplemental briefing from all parties as to issues of patent marking, joint liability of the defendants and the impact of the court of appeals' decision in *Rite-Hite Corp. v. Kelly Co., Inc.*, 56 F.3d 1538 (1995).

On May 10, 1996, the district court issued its decision awarding Alternative Pioneering approximately $1.3 million in compensatory damages as lost profits resulting from Aroma's sales of over 30,000 infringing AeroMatic Oven products. (Appendix E). The district court also found this to be an exceptional case (A. 30a - 32a) and awarded Alternative Pioneering attorney's fees and prejudgment interest (A. 33a), which were subsequently found to be approximately $350,000 (Appendix D; A. 10a). Finally, the district court awarded Alternative Pioneering approximately $4,000 in increased damages for Aroma's willful violation of the permanent injunction (A. 32a - 33a).

ARGUMENT

A. THE DISTRICT COURT DID NOT CLEARLY ERR IN ITS AWARD OF DAMAGES

1. Standard Of Review

The standard of review with respect to an award of damages in a patent infringement action is the clearly erroneous standard. *Minnesota Min. & Mfg v. Johnson & Johnson*, 979 F.2d 1559, 1577 (Fed. Cir. 1992).

2. Aroma Had Notice That Its Glass Pot Aeromatic Oven Products Infringe The '328 Patent

As mentioned above, Alternative Pioneering, through its counsel, hand delivered notice of infringement of the '328 patent to Aroma at a trade show in Chicago. That notice was delivered on January 17, 1994, more than three months before the complaint in this action was filed, and

described Aroma's infringing product as a "'glass pot' convection oven including an extension ring." (R. 795-96). As stated in the notice:

> We represent Alternative Pioneering Systems, Inc., d.b.R. Alternative Pioneering. The purpose of this letter is to notify you of U.S. Patent No. 5,165,328, owned by Alternative Pioneering. A copy of U.S. Patent No. 5,165,328 is attached to this letter.
>
> It is our understanding that you are selling in the United States a "glass pot" convection oven including an extension ring. The combination of your oven and extension ring is within the scope of U.S. Patent No. 5,165,328.

Id. Aroma's "glass pot" convection oven is also known as Aroma's "Aeromatic" oven, as admitted by Aroma's president, Peter Chang, in a declaration dated January 11, 1996:

> AROMA was incorporated as a California corporation in 1991. One of the products that AROMA started selling in 1991 was the AROMA Aeromatic Oven. This oven is shown in the photographs in Exhibit "A" attached to this declaration. **The Aeromatic Oven is of the glass pot type or category** and has a removable lid or cover.

(R. 784, bold emphasis added).

After Aroma received the January 17 notice concerning its Aeromatic oven products, Aroma engaged the Azulay firm in Chicago to defend it, along with Imex, in an anticipated infringement action to be brought by Alternative Pioneering, as discussed above.

Significantly, the only notice of infringement provided by Alternative Pioneering to Aroma up to that time was the January 17 letter concerning Aroma's Aeromatic "glass pot" oven products. The import of that fact is that an actual controversy, and apprehension of litigation, had arisen between Aroma and Alternative Pioneering concerning infringement of the '328 patent by Aroma's Aeromatic oven products.

Then, on May 1, 1994, Alternative Pioneering observed Aroma's display of an additional product at a trade show in San Francisco. That product was labeled AIT 1000, and was the subject of another letter from Alternative Pioneering to Aroma charging infringement of the '328 patent, as well as the '509 patent (R. 793-94). Aroma failed to respond to that letter, so Alternative Pioneering filed the complaint in this action, specifically alleging infringement by Aroma's AIT 1000 product, as well as generally alleging infringement and notice thereof through notice pleading:

> 26. Alternative Pioneering has placed Aroma Manufacturing and Imex Corporation on notice of '328 Patent, but the Defendants continue[] to sell their countertop air ovens and continue to infringe the '328 Patent.
>
> 27. On information and belief, the infringement of the '328 Patent by Aroma

Manufacturing and Imex Corporation has been, and continues to be, willful.

* * *

WHEREFORE, Plaintiff Alternative Pioneering prays for relief as follows:

1. For an injunction prohibiting Aroma Manufacturing and Imex Corporation from infringing the '509, '328 and '687 Patents;

2. For damages according to proof at trial;

3. That such damages be trebled, pursuant to 35 U.S.C. 284;

4. That this case be declared an "exceptional case" under 35 U.S.C. 285, and that Alternative Pioneering be awarded its attorneys fees herein;

5. For an award of pre-judgment interest, to the maximum extent allowed by law;

6. For costs of suit incurred herein; and

7. For any additional and further relief that the Court may deem just and proper under the circumstances.

(R.53-55).

In view of the prior notice given to Aroma charging infringement of the '328 patent by Aroma's glass pot

convection ovens with expansion rings, which Aroma admits to be its Aeromatic Oven products, the complaint contained sufficient allegations of infringement to include those products within its scope.

It is well established that notice pleading is sufficient in federal litigation, and that specific factual allegations are not required. As this Court held in *Conley v. Gibson*, 355 U.S. 41, 47-8, 78 S.Ct. 99, 103 (1957):

> The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' [Footnote] that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. [Footnote] Following the simple guide of Rule 8(f) that 'all pleadings shall be so construed as to do substantial justice,' we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the

> purpose of pleading is to facilitate a proper decision on the merits. *Cf. Maty v. Grasselli Chemical Co.*, 303 U.S. 197, 58 S.Ct. 507, 82 L.Ed. 745.

Accordingly, the district court properly found that:

> In May 1995, this court held that the complaint and the injunction as well as several warning letters from Alternative Pioneering gave defendants sufficient notice that the oven with expansion ring infringed the plaintiff's patents (Ex. 24 & 26). In particular, the January 17, 1994 letter specifically and expressly warned Aroma that the glass pot convection oven with an expansion ring infringed the '328 patent. This letter was delivered before Alternative Pioneering filed this lawsuit. The complaint, filed May 1994, also gave sufficient notice that ovens with expansion rings infringed the '328 patent because the patent, including Claim 19, was attached as an exhibit to the complaint.

(A. 19a). Moreover, the district court properly found that the damages awarded to Alternative Pioneering were consistent with the complaint:

> Further, the court notes that Alternative Pioneering is not seeking damages of a different type or larger amount than alleged in the complaint. The complaint sought money damages in an amount presently uncertain but subject to proof at trial. Similarly, the motion seeks money damages

> in an amount to be proven in these proceedings. Therefore, no violation of Rule 54(c) has occurred.

Id.

Thus, the court of appeals properly affirmed the district court's decision since the record amply supports that decision and shows that the district court did not make clearly erroneous factual findings or commit any error of law.

3. The District Court Properly Rejected Aroma's Marking Defense

Aroma does not dispute that the complaint alleged that notice of infringement was provided to Aroma and that Aroma continued to infringe Alternative Pioneerings '328 patent thereafter. Aroma also does not dispute that the factual allegations of notice in Alternative Pioneering's complaint must be deemed true by virtue of Aroma's default. Notwithstanding, Aroma makes the unsupported argument that Alternative Pioneering's damages must be limited because it allegedly failed to mark certain of its products with the numbers of its patents.

Apart from the irrelevance of that argument in view of Aroma's default, there simply is no evidence that the products of Alternative Pioneering which allegedly do not bear patent markings are covered by the '328 patent at issue here. As the court of appeals held in *Rite-Hite Corp. v. Kelly Co., Inc.*, 56 F.3d 1538 (1995), a patentee is entitled to lost profits resulting from infringing sales that compete directly

with the patentee's products, whether or not the patentee's product themselves are covered by the patent.

Moreover, in *King Instruments Corp. v. Perago*, 65 F.3d 941 (Fed. Cir. 1995) the court of appeals stated that it is inappropriate to raise an issue of "reverse infringement" whereby the patentee must prove that its own products infringe its own patent. In the absence of any evidence that the allegedly unmarked products of Alternative Pioneering are covered by the patent at issue, which it is Aroma's burden to prove, Aroma's marking argument must fail.

Significantly, in *Rite-Hite*, the patentee did not mark any of its products with the relevant patent number, although some of its products were marked "patent pending" (See trial court decision, 774 F.Supp. 1514, 1522 (E.D.Wis. 1991)). In addition, there was no evidence of actual notice in that case. 56 F.3d 1538 *passim*; 774 F.Supp. 1514 *passim*. Despite the absence of marking and actual notice, the patentee was awarded damages from the time that the relevant patent was issued until the time that the infringement ceased. 774 F.Supp. at 1525, 1540. Indeed, this Court held long ago that a patentee's entitlement to damages is not contingent upon marking or actual notice when it does not make or sell a product covered by its patent. *Wine Ry. Appliance Co. v. Enterprise Ry. Equipment Co.*, 297 U.S. 387, 56 S.Ct. 528 (1936).

Here, Aroma failed to prove to the district court that Alternative Pioneering's products are covered by the '328 patent, and the district court did not clearly err in making such a finding. Moreover, Alternative Pioneering is not obligated to prove reverse infringement in order to recover lost profits as damages where the infringing products directly compete with its products. Accordingly, the district court did not clearly err in its award of damages to

Alternative Pioneering, and the court of appeals properly affirmed the district court's judgment.

4. The District Court Properly Awarded Attorney's Fees To Alternative Pioneering

35 U.S.C. § 285 provides that:

> The court in exceptional cases may award reasonable attorney fees to the prevailing party.

The grounds for finding a case to be exceptional include willful infringement, misconduct during litigation, vexatious or unjustified litigation, and frivolous suit. *Beckman Instruments Inc. v. LKB Produkter AB*, 892 F.2d 1547, 1551 (Fed. Cir. 1989); *Standard Oil Co. v. American Cyanamid Co.*, 774 F.2d 448, 455 (Fed. Cir. 1985).

As discussed above, the district court found by clear and convincing evidence that Aroma willfully infringed American Harvest's patents. That factor, alone, is sufficient ground for finding this case to be exceptional and awarding American Harvest its attorney's fees. As the court of appeals stated in *S.C. Johnson & Son, Inc. v. Carter-Wallace, Inc.*, 781 F.2d 198, 200 (Fed. Cir. 1986):

> District courts have tended to award attorney fees when willful infringement has been proven, and this court has uniformly upheld such awards.

More recently, in *Amsted Industries v. Buckeye Steel Castings*, 24 F.3d 178 (Fed. Cir. 1994), the court of appeals affirmed an award of treble damages and attorney's fees where the infringer acted willfully and engaged in misconduct during litigation. As stated by the court:

> In view of our decision that the jury's finding of willful infringement must stand, there is no basis on which to conclude that the district court's finding that this case is exceptional under section 285 is clearly erroneous. [Citation]. ("An express finding of willful infringement is a sufficient basis for classifying a case as 'exceptional.'"). Additionally, we find no abuse of discretion in the district court's award of attorney fees to Amsted.

24 F.3d at 184.

Similarly, here, Aroma willfully infringed American Harvest's patents. Moreover, its misconduct during litigation provides additional ground for finding this to be an exceptional case. In Beckman, supra, 892 F.2d. 1547, the court of appeals affirmed a finding of exceptional circumstances where a defendant violated an injunction and raised defenses that it ultimately dropped. As stated by the court:

> [T]he district court's finding of exceptional circumstances is based on a strategy of vexatious activity. The three specific examples discussed above are clearly indicated to be merely that -- examples. There is certainly sufficient evidence in the

> record to support a finding that there was additional vexatious conduct on the part of LKB. [Footnote]. While it is difficult to infer bad faith on the part of LKB when each action is viewed individually, when viewed together, we cannot say that the district court's finding of vexatious litigation was clearly erroneous. This is especially true considering that the district judge was in much the best position to monitor LKB's litigation "strategy."

892 F.2d at 1552 (emphasis in original). Similarly, here, Aroma violated the permanent injunction entered by the district court and willfully engaged in improper litigation strategy.

Accordingly, Aroma's willful infringement and misconduct during litigation warrant the district court's findings that this is an exceptional case, and an award of attorney's fees to Alternative Pioneering.

a. Aroma Never Challenged The Amount Of Attorney's Fees

Significantly, Aroma did not file any opposition to the accounting submitted by Alternative Pioneering as to the amount of its attorney's fees. (A. 7a). It cannot raise issue for the first time on appeal. Thus, the amount of attorney's fees awarded to Alternative Pioneering was properly affirmed by the court of appeals.

CONCLUSION

For the foregoing reasons, the district court's judgment was properly affirmed by the court of appeals, and Aroma's petition for writ of certiorari should be denied.

Dated: July 11, 1997 Respectfully submitted,

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